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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)

)

Federal-State Joint Board on
Universal Service

)

CC Docket No. 96-45

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DA 98-977

**COMMENTS OF U S WEST COMMUNICATIONS, INC.
IN SUPPORT OF FLORIDA DEPARTMENT OF MANAGEMENT SERVICES'
MOTION FOR DECLARATORY RULING OR, IN THE ALTERNATIVE,
PETITION FOR WAIVER OF EXISTING CONTRACTS RULE**

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June 11, 1998

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U S WEST Communications, Inc. ("U S WEST") submits comments in support of the Motion for declaratory ruling or, in the alternative, Petition for waiver of the existing contracts rule filed by the State of Florida Department of Management Services ("Florida DMS").¹

I. INTRODUCTION

The Federal Communications Commission's ("Commission") rules exempt schools and libraries² and rural health care providers³ from seeking competitive bids for services which are eligible for Universal Service Fund assistance, if the services

¹ Motion for Declaratory Ruling or, Alternatively, Petition for Waiver by the State of Florida Department of Management Services, CC Docket No. 96-45, filed May 11, 1998 ("Florida DMS Petition"). Public Notice, Florida Department of Management Services Files Motion for Declaratory Ruling or, in the Alternative, Petition for Waiver, of Existing Contracts Rule, DA 98-977, rel. May 21, 1998. Pursuant to the requirements of the Public Notice, U S WEST is submitting a copy of this filing via diskette.

² 47 C.F.R. § 54.511(c).

³ 47 C.F.R. § 54.604(a).

are subject to an “existing contract.” The Commission’s rules also provide that this exemption will not apply to “voluntary extensions of existing contracts.”⁴

The Florida DMS objects to the informal opinion of the Schools and Libraries Corporation (“SLC”) that the “existing contract” exemption would be unavailable if the State exercises the preexisting renewal options which exist as part of the State’s original master contracts for telecommunications services. The SLC advised the Florida DMS that such an exercise would constitute a “voluntary extension” under the Commission’s rules.

The Florida DMS submits that:

(1) An existing contract continues to qualify as an existing contract under the Commission’s rules if it is renewed or extended by the State pursuant to the terms of a renewal provision contained in the original contract;⁵

(2) An existing contract would not continue to qualify as an existing contract if it is renewed or extended by the parties pursuant to the terms of a renewal provision which was negotiated and added by the parties after the original contract was entered into.⁶

U S WEST agrees with the Florida DMS.

⁴ 47 C.F.R. § 54.511(d) (schools & libraries); 47 C.F.R. 54.604(d) (rural health care providers).

⁵ Florida DMS Petition at 4.

⁶ Id.

II. THE COMMISSION RECOGNIZED AN EXEMPTION FOR SERVICES SUBJECT TO AN "EXISTING CONTRACT"

In the Universal Service Order, the Commission concluded that schools and libraries must solicit competitive bids for all services eligible for discounts under Section 254(h) of the 1996 Act.⁷ However, the Commission recognized an exception to this requirement if the school or library had signed a contract before November 8, 1996 for such services.⁸ The Commission reasoned that it would not be in the public interest to penalize schools and libraries that had already entered into contracts for service to refuse to allow them to obtain discounts for their existing contract.⁹ The Commission wisely chose to allow flexibility for schools and libraries to continue to realize the benefits of longer-term contracts they may have already negotiated and signed while allowing them to apply discounts to their existing contract rates for the remaining term of the contract. Such contractual commitments by schools and libraries made before November 8, 1996 were referred to by the Commission as "existing contracts," were eligible for discounts, and were exempted from the competitive bidding requirements.

In the Fourth Order On Reconsideration, the Commission changed the date for such commitments: "We conclude that a contract of any duration signed on or before July 10, 1997 will be considered an existing contract under our rules and

⁷ In the Matter of Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd. 8776, 9028-29 ¶¶ 479-80 (1997) ("Universal Service Order"), on recon., 12 FCC Rcd. 10095 (1997); appeal pending sub nom. Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir.).

⁸ Id. at 9062-63 ¶¶ 545-46.

⁹ Id. at 9064 ¶ 548.

therefore exempt from the competitive bid requirement for the life of the contract.

Discounts will be provided for eligible services that are the subject of such contracts on a going-forward basis beginning on the first date that schools and libraries are eligible for discounts.”¹⁰

III. “EXISTING CONTRACTS” WHICH CONTAIN RENEWAL OR EXTENSION PROVISIONS CONTINUE TO BE “EXISTING CONTRACTS” IF THEY ARE RENEWED OR EXTENDED BY THE CUSTOMER

Section 54.511(d) of the Commission’s rules, which was added by the Fourth Order On Reconsideration, provides that the exemption from the competitive bidding requirements for existing contracts “shall not apply to voluntary extensions of existing contracts.” The Florida DMS correctly points out that there is no discussion in the Fourth Order on Reconsideration of the reason for this addition to the Commission’s rule. The Florida DMS suggests the following explanation: “Apparently, paragraph (d) is intended to thwart attempts by state agencies to avoid competitive bidding by subsequent amendment of existing contracts to extend their otherwise expiring terms.”¹¹

The Commission discusses modifications to existing contracts in the Fourth Order On Reconsideration and adopts a test for those changes or modification which require a competitive bid and those which do not. The Commission said: “We . . .

¹⁰ In the Matter of Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, Fourth Order On Reconsideration, 13 FCC Rcd. 5318 ¶ 217 (1997) (“Fourth Order on Reconsideration”); pets. for recon. pending; appeal pending sub nom. Alenco Communications v. FCC, No. 98-60213 (5th Cir.); and id. at Appendix A, 47 C.F.R. § 54.511(c).

conclude that an eligible school, library, or rural health care provider will be entitled to make minor modifications to a contract that the Schools and Libraries Corporation or the Rural Health Care Corporation previously approved for funding without completing an additional competitive bid process.”¹²

The Commission then adopted a two-step test to determine whether a contract modification is minor:

- (1) “[W]e conclude that eligible schools, libraries, and rural health care providers should look to state or local procurement laws to determine whether a proposed contract modification would be considered minor and therefore exempt from state or local competitive bid processes.”¹³
- (2) “Where state and local procurement laws are silent or are otherwise inapplicable with respect to whether a proposed contract modification must be rebid under state or local competitive bid processes, we adopt the ‘cardinal change’ doctrine as the standard for determining whether the contract modification requires rebidding.”¹⁴

The Commission explained that the cardinal change doctrine identifies whether a change or modification exceeds the scope of the original contract.¹⁵ The policy underlying the doctrine is that a change which exceeds the scope and intent

¹¹ Florida DMS Petition at 2-3.

¹² Fourth Order on Reconsideration ¶ 224.

¹³ Id. ¶ 225.

¹⁴ Id. ¶ 226.

¹⁵ Id. ¶ 228.

of the original contract “prevents . . . bidders from competing for what is essentially a new contract.”¹⁶ The Commission concluded: “If a proposed modification is not a cardinal change, there is no requirement to undertake the competitive bid process again.”¹⁷

The addition of a contract provision permitting a party to renew or extend a contract after its execution is plainly a modification to the contract. Such a subsequent change would also represent a cardinal change, because it was not a term or condition contemplated by the parties when the original contract was negotiated and executed. A subsequently-negotiated contract renewal or extension provision, i.e., an amendment, clearly implicates the policy underlying the cardinal change doctrine, because it forecloses bidders from competing for a contract which was not contemplated when the original contract was entered into. This reasoning supports the Commission’s addition of subsection (d) to its rule to clarify that the exemption from the competitive bidding requirement for existing contracts will not apply to an extension which is negotiated and added after the original contract was executed.

This reasoning also supports the SLC’s interpretation in its Fact Sheet:

- Q. 5) What is a voluntary extension of an existing contract?
- A. A voluntary extension is an amendment which enables the contracting party to choose unilaterally whether to lengthen the term of the existing contract beyond the termination date prescribed in the existing contract. In other words, the extension is completely at the option of the contracting party who has no contractual penalties for not

¹⁶ Id.

¹⁷ Id.

exercising the option.¹⁸

However, this reasoning and the cardinal change doctrine do not support the SLC's interpretation of subsection (d) of the Commission's rule with regard to contract renewal provisions contained in an existing contract which permits a party to renew or extend the contract. Such provisions were contemplated by the parties as part of the original contract bidding process. Such provisions were not added as an "amendment" after the original contract was signed. In fact, such provisions do not even represent a change to, or modification of, the original contract, because they are contained in the original contract. Accordingly, when a party exercises a contract right contained in an existing contract to renew or extend that contract, there is no change or modification to the contract, the cardinal change doctrine is not implicated, and the competitive bidding requirement does not apply.

U S WEST agrees with the Florida DMS that the Commission should issue a declaratory ruling that the exercise of a renewal or extension provision contained in an original "existing contract" does not disqualify the contract as an "existing contract" and, therefore, such a renewal or extension is not subject to the competitive bidding requirements.

IV. THE SLC HAS PREVIOUSLY MISINTERPRETED THE COMMISSION'S "EXISTING CONTRACT" RULES

When it filed its Petition for Reconsideration or Clarification of the Fourth Order on Reconsideration, U S WEST asked the Commission to clarify that telecommunications services purchased under a carrier's interstate tariff, pursuant

¹⁸ SLC Fact Sheet on Master Contracts, February 24, 1998 (emphasis added).

to which a school or library or rural health care provider has made a term commitment, should be regarded as "existing contracts" under the Commission's rules.¹⁹

The SLC has taken the position that the Commission's "existing contract" rules require a "signed contract," between the carrier and the school, library, or health care provider, even though U S WEST's and many other carriers' services in the interstate jurisdiction are only provided pursuant to tariff. Carriers like U S WEST have designed interstate tariffs which provide an end-user customer with many of the same economic benefits, as well as liabilities, of a privately negotiated and signed contract. Their interstate tariffs contain all of the material terms and conditions which would otherwise be contained in a contract. However, the SLC has taken the position that a signed contract is required for the "existing contract" exemption.

U S WEST believes that the same public policy considerations which supported the Commission's adoption of the exemption for "existing contracts" also apply to services purchased under rate stability plans and variable term pricing plans, or similar plans offered by other carriers, in the interstate jurisdiction even though the customer's commitment may not be evidenced by a signed contract.

The SLC disregarded common characteristics of contracts when it concluded that customers' and carriers' commitments for interstate telecommunications

¹⁹ Petition for Reconsideration or Clarification of Fourth Order on Reconsideration of U S WEST, Inc., CC Docket No. 96-45, filed Feb. 12, 1998 at 7-13 ("Petition for Reconsideration").

services under rate stability and variable term pricing plans in the carriers' interstate tariffs were not eligible as "existing contracts" under the Commission's rules. It is for that reason that U S WEST filed a Petition For Reconsideration Or Clarification on February 12, 1998, asking the Commission to correct this misinterpretation. The Commission has not as yet issued an order doing that.

The concern about the SLC's misinterpretation of the "existing contract" rule is now heightened by the SLC's misinterpretation of the "voluntary extension" rule as applied to "existing contracts." The Commission must act to correct this misinterpretation as well.

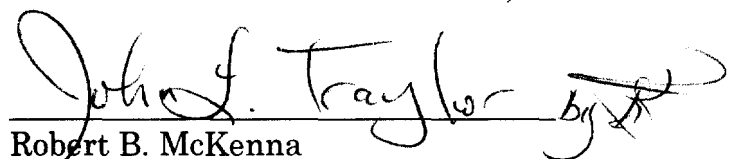
V. CONCLUSION

The Commission should issue a declaratory ruling that the exercise of a renewal or extension provision contained in an original "existing contract" does not disqualify the contract as an "existing contract" and, therefore, such a renewal or extension is not subject to the competitive bidding requirements in the Commission's rules.

Respectfully submitted,

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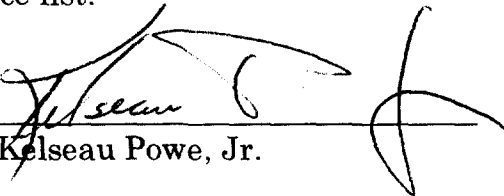
Of Counsel,
Dan L. Poole

Its Attorneys

June 11, 1998

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 11th day of June, 1998, I have caused a copy of the foregoing **COMMENTS OF U S WEST COMMUNICATIONS, INC. IN SUPPORT OF FLORIDA DEPARTMENT OF MANAGEMENT SERVICES' MOTION FOR DECLARATORY RULING OR, IN THE ALTERNATIVE, PETITION FOR WAIVER OF EXISTING CONTRACTS RULE** to be served, via United States Mail, postage prepaid, upon the persons listed on the attached service list.


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